

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35531

STATE OF IDAHO,	)	2010 Unpublished Opinion No. 403
	)	
Plaintiff-Respondent,	)	Filed: March 30, 2010
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
ROBERT WEBB,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Jon J. Shindurling, District Judge.

Order revoking probation and executing reduced sentence, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

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GRATTON, Judge

Robert Webb appeals from the district court's order revoking his probation and ordering into execution a reduced sentence. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Webb was convicted, upon jury verdict, of felony driving under the influence, Idaho Code §§ 18-8004, 18-8005(5), 18-8008. The district court imposed a sentence of five years determinate, suspended the sentence, and placed Webb on probation for five years. Thereafter, Webb violated the terms of his probation and the district court revoked his probation, executed the original sentence, and retained jurisdiction. Following the period of retained jurisdiction, the district court again placed Webb on probation. Subsequently, another report of probation violation was filed and a hearing conducted. At the hearing, Webb appeared without counsel, waived his right to counsel, and admitted the violations. The district court revoked Webb's

probation, sua sponte reduced his sentence to five years with three years determinate, and executed the sentence. Webb appeals.

## II. ANALYSIS

Webb contends that the waiver of his right to counsel at the hearing on the probation violation was invalid. When reviewing a lower court's determination regarding the waiver of a constitutional right, we accept the trial court's findings of fact if supported by substantial evidence; however, we freely review the court's application of constitutional requirements to the facts as found. *State v. Hoffman*, 116 Idaho 689, 691, 778 P.2d 811, 813 (Ct. App. 1989). A criminal defendant has a constitutional right to the assistance of counsel at all critical stages of the criminal process. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963); *State v. Blevins*, 108 Idaho 239, 241-42, 697 P.2d 1253, 1255-56 (Ct. App. 1985). An accused also has the right to waive the assistance of counsel and to represent himself or herself. *See Faretta v. California*, 422 U.S. 806 (1975); *State v. Averett*, 142 Idaho 879, 885, 136 P.3d 350, 356 (Ct. App. 2006). A waiver of the right to counsel is valid only if it was effected knowingly, voluntarily, and intelligently. *Averett*, 142 Idaho at 885, 136 P.3d at 356. The burden is upon the State to show that the waiver satisfied this standard. *State v. Hunnel*, 125 Idaho 623, 625, 873 P.2d 877, 879 (1994). If there was a deprivation of the right to counsel through the trial court's acceptance of an invalid waiver, the error is fundamental and therefore necessitates our independent review although the claim was not raised below. *See Hunnel*, 125 Idaho at 625, 873 P.2d at 879; *State v. King*, 131 Idaho 374, 376, 957 P.2d 352, 354 (Ct. App. 1998).

There is no uniformity in American courts as to the precise requirements for a valid waiver of the right to counsel or even whether a specific judicial admonition regarding the risks of self-representation is necessary in all situations. *See State v. Jackson*, 140 Idaho 636, 639, 97 P.3d 1025, 1028 (Ct. App. 2004). Idaho courts examine the totality of the circumstances in determining if a waiver of the right to counsel was valid. *State v. Lovelace*, 140 Idaho 53, 64, 90 P.3d 278, 289 (2003); *King*, 131 Idaho at 376, 957 P.2d at 354. The analysis of whether a defendant's waiver is valid rests upon the individual facts of the case. *Hunnel*, 125 Idaho at 625, 873 P.2d at 879; *see also King*, 131 Idaho at 376, 957 P.2d at 354 (valid waiver of counsel is a question of fact turning upon the defendant's state of mind). For a waiver to be knowing and intelligent, the defendant must be aware of the nature of the charges filed against him or her, the

penalties that may result from those charges, and the dangers and disadvantages of self-representation. *See Lovelace*, 140 Idaho 53, 64, 90 P.3d 278, 289; *State v. Lankford*, 116 Idaho 860, 865, 781 P.2d 197, 202 (1989); *see also United States v. Harris*, 683 F.2d 322, 324-25 (9th Cir. 1982). Idaho Code § 19-857 states that the court “shall consider such factors as the person’s age, education, and familiarity with the English language and the complexity of the crime involved.”

The following colloquy occurred at the probation violation hearing:

THE COURT: All right. We will be on the record in Case No. CR-04-23276, State of Idaho versus Robert William Webb. Present on behalf of the State of Idaho is [Deputy Prosecuting Attorney].

Do you have counsel, Mr. Webb?

THE DEFENDANT: No, sir.

THE COURT: Do you wish to have counsel?

THE DEFENDANT: No.

THE COURT: Well, wait a minute, and I will get that paperwork.

I received a copy of the Report of Violation and signed a warrant, but it’s not in the file.

This has not been even clocked in.

All right. Do you want to distribute these?

COURT MARSHAL: Yes.

THE COURT: All right. Mr. Webb, do you want to stand, please?

As I mentioned, you’re brought before this Court with regard to a Report of Violation of Probation dated June 17, 2008. The purpose of today’s hearing is to give you the chance to either admit or deny the allegations set forth in the report.

Now, as I understand it, you wish to proceed without counsel; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand fully the ramifications of doing so?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that under the Constitution, you have the right to have counsel appointed if you cannot afford counsel?

THE DEFENDANT: Yes.

THE COURT: You have the right, as I said, to counsel under the Constitution. Do you understand that if you do not have counsel, you choose to represent yourself, you will be held to the same standard that you would be held to as if you had an attorney? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you’ll be subject to the rules of both procedure and evidence, just as if you had an attorney, and it is your responsibility to respond to that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you further understand that if you choose to represent yourself in these proceedings and the outcome is not to your liking, you can't go back later and claim that you had ineffective assistance of counsel? You're stuck with yourself.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And it's strongly my recommendation that you have assistance of counsel, but I can't enforce that. You can proceed on your own if you wish.

Now, do you still wish to be on your own?

THE DEFENDANT: Yes.

THE COURT: All right. Well, as I said, you have the right here to either admit or deny the allegations in the report. How do you wish to proceed?

THE DEFENDANT: I wish to admit.

THE COURT: All right. Well, let's go through them.

It says that you violated Court-Ordered Condition Rule 12, which says you will not frequent any establishment where the sale of alcohol is the major source of income, and you must not consume any alcoholic beverages, nor use any drugs or controlled substances not prescribed by a licensed physician.

It says, in summary of that violation, that on June 30th -- or, excuse me, June 3, 2008, you admitted to using alcohol and cocaine since December of 2007.

Do you admit or deny that?

THE DEFENDANT: Admit it.

THE COURT: It next asserts that you violated Agreement of Supervision Rule No. 1, which states that you will respect and obey all laws and comply with the lawful request of your supervising officer or agent of the Division of Community Corrections.

It says, in summary, that on June 10, 2008, you drove to and from your cognitive program at Probation and Parole without any driving privileges.

Do you admit or deny that?

THE DEFENDANT: Admit it.

THE COURT: All right. The defendant having admitted the allegations in the Report of Violation, Mr. Webb, I'll hear you with regard to what you think I ought to do here.

THE DEFENDANT: I screwed up. As far as the driving, when I needed to make it to my class, I did drive. I broke the rules, but I thought going to the class was more important than what I did. And I guess that's wrong, too. So I don't know. I don't know. I've tried to work. I've tried to pay all my fines. I've tried to get everything back in order, and it doesn't seem like anything's coming around.

Webb claims, first, that the waiver of counsel was invalid on the ground that the district court did not comply with the mandatory requirements of I.C. § 19-857 because it did not consider the particulars of Webb's situation "such as age, education, etc." However, as stated in *Anderson*, 144 Idaho at 746-47, 170 P.3d at 889-90, "[t]he particular moment of the waiver is not

the only consideration; rather, the record as a whole is considered.” Here, the district court was, as evidenced by the record, very familiar with Webb, having presided over his arraignment, jury trial, sentencing, probation violation proceedings, and retained jurisdiction. The information in the record included Webb’s age, education, understanding of English, citizenship, and familiarity with the legal system.

Second, Webb argues that he was not adequately advised of the penalties that could flow from the proceeding and that the nature of the charges were not made clear until after the waiver. Once again, the particular moment of the waiver is not determinative and the record as a whole is considered. Webb was made aware, by the court, that he was on strict probation, that violations would not be tolerated, and that the maximum five-year imprisonment term would be imposed. Although the district court determined to sua sponte grant leniency and reduce the determinate term to three years, Webb knew the possible outcome of the proceeding and the reasons for the proceeding.

Finally, Webb contends that the district court failed to adequately advise him that the proceeding would include both the determination of violation and the disposition. Once a waiver of the right to counsel is made, it carries forward through all further proceedings in that case unless there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings. *Id.* at 747, 170 P.3d at 889. Upon admission of the probation violation, the district court inquired of Webb what he thought the court should do in disposition of the matter, to which he responded, again admitting the violation, but indicating his efforts at compliance. The district court acknowledged that he had received a letter from Webb’s employer the day before the hearing and engaged in discussion regarding disposition with the prosecutor. Again, the district court asked Webb if he had anything to add to which Webb replied that the court should do what it saw “fit” to do with him. The circumstances here do not suggest that the waiver was limited to the determination of probation violation and not the disposition.

### **III.**

### **CONCLUSION**

Webb knowingly and intelligently waived his right to counsel. The district court’s order revoking Webb’s probation and ordering into execution a reduced sentence is affirmed.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**